

1 Q. You would agree with me -- putting aside
2 whether it's accurate or not in this case -- if the
3 tabulation is not accurate, the underlying data and
4 then ultimate opinions that come from it isn't as
5 accurate as it would be if it was done properly;
6 right?

7 A. True.

8 Q. If people fill in the blanks wrong, that's
9 error by a questioner, as opposed to error by the
10 consumer; right?

11 A. Yes. You're talking about interviewer.

12 Q. Interviewer error.

13 A. Yes. That does happen sometimes.

14 Q. And you said before that sometimes something
15 called "interviewer fraud" may even happen.

16 A. Yes.

17 Q. What is that?

18 A. Where the interviewers just fake the
19 interviews.

20 Q. Because they want to get done and get their
21 paycheck and go home?

22 A. Yes, that could be a reason.

23 Q. Sometimes you pay the participant in the
24 survey; right?

25 A. Yes.

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1 it happen, about the underlying survey?

2 A. It's got problems.

3 Q. Okay. You talked about the geographic
4 diversity. You only surveyed 100 people in the
5 controls. So for some of the locations you might have
6 asked 10 or 12 or 15 people to look at the control and
7 some other places on the island; right?

8 A. Yeah. It lays that out in the Advanced
9 Research Center report.

10 Q. You didn't tabulate the data. The Advanced
11 Research sent a report that's been turned over and
12 produced up here. That makes no distinction between
13 the answers of people in San Juan proper, San Juan
14 suburbs, or other parts of Puerto Rico, does it?

15 A. No, we don't usually break it down that way.
16 I mean, you could, obviously; but we were interested in
17 just representing the universe here.

18 Q. If you wanted to know if it made a difference
19 what people in one part of Puerto Rico say versus
20 people in another, you would look at that data; right?

21 A. You could.

22 Q. You've never done that.

23 A. No, I didn't think it was relevant.

24 Q. So when you just said there might be a
25 difference between what people in one part of the

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1 Q. Mr. Johnson surveyed 800 people. None of
2 those were paid. The survey you did, every participant
3 got paid money; correct?

4 A. No, they didn't, actually. I had set it up
5 that way initially, because doing surveys in shopping
6 malls, for example, especially if you're in a rush,
7 it's a good way to get respondents in. And that's the
8 way I had set it up, because we didn't have a lot of
9 time here. But when it actually went to the field,
10 they didn't feel it was necessary to pay people.

11 I mentioned there were some differences, the
12 questionnaire I developed and when it went into the
13 field, there were some minor differences. That was one
14 of them. We didn't pay the respondents.

15 Q. So your respondents were not paid, either.

16 A. Correct.

17 Q. That might be something that would draw in
18 fraud. But you also might have the interviewer just
19 filling things out because 'It's 4:45. My surveys are
20 due today. I only have 60; I need 100. Let me just
21 pound a few others.' That could happen.

22 A. Definitely.

23 Q. Have you seen that happen?

24 A. Yes.

25 Q. What does that mean to you, when you've seen

1 island say versus various locations in and around San
2 Juan, you don't have any facts for that. That's just
3 your guess. You haven't seen the data.

4 A. No, I wouldn't subscribe to that. It's really
5 an issue of methodology. I mean, how do you set up the
6 study?

7 You could potentially, obviously, when we have
8 the time, could go back and see if it would have
9 matters. But the idea was that the universe you're
10 trying to project to is all of the island. And if
11 you're just interviewing people in one part of the
12 island, there is always the question of whether you're
13 fully representing all the opinions in the island and
14 whether you might have gotten differences.

15 I don't know whether we would have. I didn't
16 analyze it, so I can't tell you. But the methodology
17 is such that Mr. Johnson methodology is more limited in
18 terms of what statements he could make about Puerto
19 Rico.

20 He can really make statements about maybe San
21 Juan. But I don't know that he could make any
22 statements about the rest of the island, because he
23 didn't interview anybody in the rest of the island.

24 Q. And you don't know what the impact of
25 interviews on the rest of the island versus interviews

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1 in San Juan, because you didn't tabulate the data nor
2 have you seen that data; right?

3 A. That's correct.

4 Q. Dr. Mazis, you made a nice reference to row,
5 row, row your boat on your direct. Do you remember
6 that?

7 A. Yes.

8 Q. That the question had the word "or" in it, and
9 you didn't like it. You thought people were going to
10 be confused if you asked them "or" questions; right?

11 A. No, I didn't say that. I said when the
12 question is very long and when you have "or" in there
13 four different times, it just wasn't consumer friendly.

14 Q. The proper question to ask people when you're
15 trying to find out if they know something is do you or
16 don't you know; correct?

17 A. No, not necessarily. I have used that
18 formulation sometimes, but not always sometimes, but
19 not always. Sometimes it's just confusing to people.

20 You have to look at the question. And
21 sometimes you just need to break it into smaller
22 questions. Rather than have all those or's, maybe you
23 want to have 1A, 1B, 1C. That might be easier. People
24 could answer each one separately.

25 Q. You might want to have a two-part question

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1 you know?' Right?

2 A. That's one formulation. I mean, you could
3 take the Ever Ready formulation. And if you wanted to
4 do that, it could be 'who puts out this product?' Or
5 you could say 'or don't you know?' You could append
6 that if you wanted to. It would with more user
7 friendly, more consumer friendly.

8 I'm not saying there is one way to do these
9 questions. There are obviously different ways.
10 Different experts can disagree on how to formulate it.

11 But in this case anybody could look at this
12 question and say 'this is a very complex question, very
13 hard to answer.'

14 Q. We'll get to that in a second. You said on
15 direct that when you formulated this survey you thought
16 there were two versions, one in yellow and one in
17 white; right?

18 A. Actually, they would be the exact same
19 questionnaire. It's just I was going to call it
20 Version 1 and 2. And...

21 Q. So your original plan was to have a version
22 that -- same exact texts on those surveys.

23 A. Correct.

24 Q. And you would label one Version 1. Which
25 would that have referred to? Your test?

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1 versus a one-part question.

2 A. Possibly. It would depend on the
3 circumstances.

4 Q. You have before used the phrase "do you or
5 don't you know." Right?

6 A. I have at times.

7 Q. And the reason you use that is to prevent what
8 is called "yea-saying," because if you ask 'do you
9 know,' we both have a tendency -- it's human nature to
10 say "Sure, I know."

11 People don't want to admit that they don't
12 know something; right?

13 A. Sure. Sometimes it's useful if it doesn't get
14 in the way of consumers' understanding.

15 Q. Because you might have people who don't really
16 know answer yes just because the question was bias.
17 The question is 'do you know that?'

18 You really want to know if they actually know;
19 right?

20 A. Yes.

21 Q. You don't want to know if they are telling you
22 they know if they don't.

23 A. True.

24 Q. So you ask the question in a way that gives
25 them a choice. It's either 'do you know?' or 'don't

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1 A. Yes, that was going to be the test ad, because
2 that was the yellow.

3 Q. And you were going to make the survey paper
4 yellow.

5 A. Yes.

6 Q. And you would have a control. This is the
7 white box.

8 A. Right.

9 Q. And you were going to make the survey paper
10 for that white?

11 A. Yes. It prevents interviewers from picking up
12 the wrong box.

13 Q. When you do these surveys and you have two
14 choices, like Mr. Johnson's with the SAME product and
15 the control the SUGAR TWIN, normal practice would be to
16 rotate them. You have the first guy that comes in and
17 does one. It's somewhat random. So you don't go 100
18 of these and then we'll pull out 100 of these; right?

19 A. Right, yes.

20 Q. You mix them up.

21 A. Right.

22 Q. When you did your test, was it done that way
23 or did somebody go with the yellow forms to do the test
24 first?

25 A. No. I don't think so. That's not my

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1 understanding.

2 Q. You don't know. It could have happened.

3 A. I talked to the Auri Beltran. And my
4 understanding is it was varied. Because I did ask
5 about that. So that's all I can rely on is what she
6 told me.

7 Q. Often the survey questionnaire has a little
8 box. Did you show them a test, or did you show them a
9 code where you don't tell the questioner which is test
10 or which is the control, because then they might be
11 biased. So you use some code; right?

12 A. I can't remember what was done in this case.

13 Q. That's normal practice.

14 A. Yes.

15 Q. And in this case your survey questionnaire has
16 a code on it. Is this Version 1 of the survey or
17 Version 2?

18 And just so I understand again, Version 1 is
19 the test.

20 A. Yes, I believe so.

21 Q. And 2 is the control. So if they got Version
22 1, it's a yellow box.

23 A. I believe that's correct.

24 Q. And if they got Version 2, it's a white box,
25 your control.

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1 them the answer.

2 A. Yes.

3 Q. So when your interviewees were looking at the
4 SPLENDIA box, right in front of them was a questioner
5 holding a survey on yellow paper; right?

6 A. Yes.

7 Q. Is this normal for you that you would make the
8 paper of the survey in the same background color of the
9 box that you're trying to ask questions about?

10 A. Yes. I think it's hard for people to ignore.
11 I mean, people know it's a yellow box. It's not a
12 great surprise here.

13 Q. And people are saying 'yellow,' when they look
14 at this; right? People are indicating that's one thing
15 they notice about the box.

16 A. Right.

17 Q. Don't you think it's a little funny to use a
18 piece of paper that's yellow for those people as
19 opposed to just white paper that we normally use?

20 A. Well, I mean, that's an interesting issue. I
21 just think you have more interviewer errors if you did
22 that. So you have to balance the issue. If you used
23 all white paper, people would be picking up the wrong
24 boxes all the time.

25 So you have to make some judgment about that.

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1 A. I believe so.

2 Q. So the questioner fills it out when somebody
3 comes in and they pick the one they are going to use
4 that time. They pick this one up, and then they go to
5 the form and they write right on the form like this one
6 'Version 1.' Then when somebody tabulates the data,
7 they put in, okay, this interviewer showed this person
8 the yellow box.

9 A. And it would be printed on the yellow paper.

10 Q. In this case you had a backup, a double check,
11 of it's not only circled as Version 1, the questioner
12 when they are standing there is writing on yellow
13 paper.

14 A. Yes, because it's very easy for interviewers
15 to make errors on these studies.

16 Q. That's why you have to find a firm that's
17 accurate and reputable.

18 A. Well, it's helpful. But even finding accurate
19 and reputable firms, the people out there interviewing
20 they make errors, they just make a lot of errors.

21 So one way to avoid it is to try to use
22 methods to cut down on errors.

23 Q. And they have a clipboard or some other pad or
24 paper; and they have questionnaires like this sitting
25 on top, and they are writing as the person is giving

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1 I think, especially the way this study was fielded, in
2 all these different locations, it is a situation where
3 people could make a lot of errors. And so this was a
4 way to reduce those errors.

5 Q. Because if people made those errors, that
6 would question the accuracy of your survey.

7 A. Yes.

8 Q. Let me show you a couple of other things, Dr.
9 Mazis. First, just so I'm clear, Version 1 is the
10 yellow box, the test in this case; right?

11 A. That's my understanding.

12 Q. And questioners were supposed to fill those
13 out on yellow paper; right?

14 A. Yes.

15 Q. Dr. Mazis, there were 37 surveys in your set
16 of questionnaires that are done as Question 1, the test
17 one, on white paper. Are you aware of that?

18 A. No, they might have run out of yellow paper.
19 I've had that happen.

20 Q. There are no controls done on yellow paper.

21 A. Well, that makes sense, then.

22 Q. So you think maybe they ran out of yellow
23 paper.

24 A. I've had that happen.

25 Q. Your surveyors were specifically instructed:

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1 200 over here and 100 over here with the control.
 2 Right?
 3 A. Yes.
 4 Q. When you count up the surveys that were handed
 5 over to us Wednesday day night, there are -- one is
 6 missing -- 200 on yellow paper. They all say Version
 7 1.
 8 Fair to say all those people if it was done
 9 right were shown the test.
 10 A. Yes, it sounds right.
 11 Q. There are 37 survey questionnaires on white
 12 paper that circle No. 1. And as you just said before,
 13 you think if it was done, if the interviewer did the
 14 right job and they just ran out of paper, those people
 15 also saw the rest; right? Correct?
 16 A. That would be my understanding.
 17 Q. If it was you tabulating, you would pay more
 18 attention to what the person circles which version is
 19 being shown than what the color of the paper is;
 20 correct?
 21 A. I would think so. But I don't know what they
 22 did. It may be that they saw the white paper when they
 23 got back to the home office and they assumed that that
 24 was the control.
 25 I can't tell you because I just don't know.

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1 happened with the survey; right?
 2 A. That's certainly one option.
 3 Q. That's the better option.
 4 A. Not necessarily. If there is a good reason
 5 for what Mr. Lopez did, then I would go with that if he
 6 could explain it. But this is the first time I've
 7 heard about this, so...
 8 Q. You had no idea about this.
 9 A. No.
 10 Q. Dr. Mazis, you might ask the person who did
 11 the survey question itself 'what happened when you
 12 filled this one out?' You wouldn't try to go through
 13 and look at the answers and then work backwards to
 14 figure out which one someone was shown. That would be
 15 wrong.
 16 A. I don't think that would be the way to do it.
 17 That wouldn't be proper.
 18 Q. Be wrong.
 19 A. I think so.
 20 Q. You don't know if these 37 are included in
 21 your test or your control; right?
 22 A. I don't know, but it's something now that
 23 you're mentioning it. I'd like to know the reason.
 24 Maybe we need to retabulate, find out -- first of all,
 25 find out. One thing we could do is we could rerun the

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1 Q. So let's look into that. You said what may it
 2 happened.
 3 If you were looking at surveys when you're in
 4 the back office and it comes in on white paper with 1
 5 circled, which means white paper should mean it's the,
 6 1 circled means it's this one; would you toss that one
 7 out because this is not something you could rely upon?
 8 A. I don't know what Mr. Lopez did. I'd have to
 9 talk to him and determine exactly what he did in that
 10 situation.
 11 Q. I'm asking you, in your experience, you want
 12 to have a reliable, accurate survey, which take those
 13 37 that are either miscoded or in your system wrong
 14 paper, and toss them away and not include them in your
 15 total, or would you include them?
 16 A. Well, I think what I would do is I would have
 17 the field person, Mr. Lopez, talk to the interviewers
 18 and determine.
 19 If it were paper problem, he would have known
 20 that. So he might be able to figure out what the story
 21 was with those 37. I don't know.
 22 Or, alternatively, you could throw them out.
 23 I mean, those are the two options.
 24 Q. It would certainly be more accurate to discard
 25 them than to try to glean after the fact what we think

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1 data without the 37 and see if it matters.
 2 Q. That's a great idea, Dr. Mazis.
 3 (Publishing.)
 4 This is your first question. "Have you ever
 5 seen or purchased a no-calorie sweetener that looks
 6 like the one I showed you or don't you know?"
 7 See that?
 8 A. Yes.
 9 Q. You have at least two or's in that question;
 10 right?
 11 A. Only two.
 12 Q. Seen or purchased.
 13 Let me digress for a second. Seen or
 14 purchased. If you purchased it, you had to have seen
 15 it; right?
 16 I assume none of the survey participants
 17 couldn't see; thus, if you purchased it, you would have
 18 to have seen it; right?
 19 A. Yes.
 20 Q. So why would you ask that question? Doesn't
 21 it bias people toward 'this is a product that could
 22 actually have recently purchased?'
 23 A. I don't see the question as biasing at all.
 24 And, actually, I took that question exactly from the
 25 Granutech study, the McNeil versus Granutech that you

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1 referenced. It was the exact same question except they
2 put the 'or don't you know' at the end of it.

3 Q. So when you said earlier that you wrote the
4 questionnaire, you took it from an earlier
5 questionnaire that McNeil had done; right?

6 A. No, I didn't do that. I referred to it. But
7 as I said, I made certain changes in it. And adding
8 the 'or don't you know,' was one of the changes I made.

9 Q. Because you thought it would be more accurate
10 to put 'or don't you know,' because if asked it the way
11 it was asked in the Granutech survey, that might be
12 misleading; that might bias people.

13 A. It's possible.

14 Q. Did you come up with the idea to look at that
15 McNeil survey or did the lawyers give that to you?

16 A. Well, they gave it to me, because it was
17 mentioned in the Merisant's filings.

18 Q. What was listed in the papers was that McNeil
19 should do a survey like they have done before of an
20 Ever Ready type. And they did one in that case; not
21 that that's the proper technique and questions to ask
22 in a survey; correct?

23 MR. ZALESIN: Objection. I think it misstates
24 what was said in the papers; and, second, the witness,
25 I don't think, has ever seen the papers, and he should

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1 at it.'

2 And it's very similar to other secondary
3 meaning surveys.

4 Hey, I'm willing to look at surveys and if the
5 information is useful, then I'll take advantage of
6 that.

7 Q. Let's come back to these 37 people who are
8 questionable at best or miscoded.

9 A. Okay.

10 Q. This is your data.

11 A. Okay.

12 Q. You show the yellow box and you asked if you
13 have ever seen or purchased it.

14 Of the 200 that are in your data, 174, 87
15 percent, said that they had seen this box or purchased
16 this box; right?

17 A. Okay.

18 Q. 26 or 13 percent said they had seen or
19 purchased this box, if you use the way it was tabulated
20 in your report.

21 A. Okay.

22 Q. I'm sorry. They said they didn't know that.

23 When we go on the right column, the white box,
24 55 percent of the people who were shown the control
25 said they had seen or purchased this box; right?

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1 simply be shown the paper before he comments on what it
2 says.

3 MR. LOCASCIO: Then we can do that, Your
4 Honor.

5 BY MR. LOCASCIO:

6 Q. Dr. Mazis, you just mentioned you used --

7 THE COURT: Are you going to show him that?

8 MR. LOCASCIO: I'm going to ask him the
9 foundational questions to see if we need to do that,
10 Your Honor.

11 BY MR. LOCASCIO:

12 Q. You mentioned a second ago that Merisant had
13 said something and that's why you thought this was a
14 good question to use.

15 You never read Merisant's filings in this
16 case; right?

17 A. I don't think so.

18 Q. So you didn't think of your own, 'Well, I
19 should use this former McNeil survey question because
20 of something Merisant said.' You thought of that after
21 you talked with the lawyers. Fair?

22 A. Right, yeah. They provided that with me and
23 they said 'this is the survey that was accepted by the
24 Court,' and it had been mentioned in the Mersant
25 filings. So I thought, 'Well, okay, let me take a look

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1 A. Yes.

2 Q. That's error, isn't it? Those people never
3 saw or purchased this box.

4 A. Well, people are compliant. It's not error,
5 it's that people are complying with the question.

6 Q. They are yea-saying.

7 A. They are definitely yea-saying.

8 Q. You went out of your way to find a control
9 that was never in the marketplace at all; right?

10 A. Uh-huh (positive response.)

11 Q. In Puerto Rico there has never with a sale of
12 this box.

13 A. Right.

14 Q. Even with the brand name on it.

15 A. Right.

16 Q. The box you chose is a control was never sold
17 to anyone in Puerto Rico; right?

18 A. Yes.

19 Q. So no one who looked at your survey
20 questionnaire could have ever seen this box or
21 purchased it; right?

22 A. Right.

23 Q. So when 55 percent of the people you surveyed
24 with your tabulation said 'I indeed have seen or
25 purchased this box,' they are wrong.

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1 A. Well, survey researchers, we don't look at it
2 as right or wrong. We look at it as that's an opinion
3 that's being expressed. And, obviously, people are
4 compliance. So as you called it "yea-saying," people,
5 you show them a box that looks real, and, you know,
6 okay, sure. People don't expect you're going to give
7 them a fake box.

8 Q. You did give people a fake box and they said
9 they had seen or used it; right?

10 A. Yes.

11 Q. And that's not -- you don't want to use the
12 word "wrong," but those people are mistaken; right?

13 A. Yes, they are.

14 Q. They have made an error. They have not
15 actually seen or purchased it, but they are saying they
16 did. They are yea-saying.

17 A. Yes.

18 Q. Is 55 percent a little high for yea-saying?

19 A. It's higher than I would have expected.

20 Q. Indeed, it's quite high.

21 A. I've never done a survey in this area. I
22 don't know whether this is common. I really don't
23 know. But surveys that I have done, I usually don't
24 get that high a figure.

25 Q. You have never done a secondary meaning

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1 A. Yes.

2 Q. And you came in and said, 'Well, this is
3 ridiculous. They need a better control.'

4 A. They didn't have a control.

5 Q. There was no control. So you came up with a
6 hypothetical control.

7 A. Correct.

8 Q. One that did not exist in the marketplace.

9 A. Right.

10 Q. And you asked people a question, if they
11 believed that hypothetical product could have a certain
12 function -- right? -- or feature.

13 A. It's been a long time. I don't remember the
14 details of it.

15 Q. You asked them a question, and you got some
16 yea-saying; right?

17 A. I just don't remember the details. It's been
18 a long time.

19 Q. It was 1996; right?

20 A. My memory is fading as years go on. Yes.
21 Eight years ago.

22 Q. The person on the other side was Ms. Parikh,
23 P-a-r-i-k-h; right?

24 A. Yes.

25 Q. And she had testified -- pardon me. This is

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1 survey; is that what you mean?

2 A. No, I said I've never done any study in Puerto
3 Rico before. Whether people in Puerto Rico comply more
4 than other people, I don't know.

5 Q. You're saying that perhaps it's not the
6 question or the control's fault that that number is so
7 high, but it's people here in Puerto Rico just say yes
8 when shown a box?

9 A. You know, I don't know. I really don't know.
10 I don't know what the reason for it is.

11 Q. You have testified before about yea-saying;
12 right?

13 A. Yes, I have.

14 Q. And you said that 17 and-a-half percent was
15 ridiculously high.

16 You don't remember that? I can show you.

17 A. I'm sure you will. I haven't seen it. I
18 don't remember.

19 Q. You don't remember?

20 A. No.

21 Q. Do you remember testifying in a case involving
22 Ameritech?

23 A. Oh, yes.

24 Q. Do you remember that there was a survey put
25 on. That was the other side.

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1 the Northern District of Illinois opinion afterwards.
2 (Publishing.)

3 This is you, to test your theory that the
4 Parikh study inadequately controlled for noise, you
5 redid it. You used the questionnaire Ms. Parikh had
6 done, but you added the control. And you came up with
7 Ultra Tone. And Ultra Tone didn't really exist; right?
8 It was the hypothetical?

9 A. Right.

10 Q. It was the made up control, like this box we
11 used in your survey in this case; right?

12 A. Yes.

13 Q. And then later on it says you were telling the
14 Court, 'If people responded that the question you
15 asked, the people responded it applies to, it can be
16 assumed they are guessing, because there is no such
17 thing as the Ultra tone; right?

18 If someone said they had seen or purchased
19 this before, they are guessing, because they had never
20 seen or purchased it before; right? That would be
21 yea-saying.

22 A. Right. But that's what we are trying to
23 measure here, right.

24 Q. And you want to subtract out the yea-saying.
25 That's what you are saying in this opinion.

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1 A. Yes. The same thing as this M.C.I./Ameritech
2 study.
3 Q. And in the M.C.I. case you said the people you
4 asked, 17.4 percent of them yea-sayed.
5 A. Yes.
6 Q. And in your test in this case, 55 percent were
7 yea-sayers; right?
8 A. On this question, yes.
9 Q. And then you go on to this. "Dr. Mazis
10 indicated the level of noise, the percent of people who
11 were willing to respond in a," quote, where you, I take
12 it, "a ridiculous manner to a question that made not
13 sense." Right?
14 A. Right.
15 Q. And then you subtracted out that yea-saying
16 noise level, in this case, 17.4 percent, from the
17 overall number for the test in order to determine what
18 the accurate level was of confusion; right?
19 A. Yes. That was on the key claim. You have to
20 remember that. That's what the subtraction was.
21 Q. But in this case, 17.4 percent of yea-sayers,
22 you said those people were willing to respond in a
23 ridiculous manner to a question that made no sense.
24 Right?
25 A. Yes.

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1 might be yea-sayers. Right?
2 A. I'm sorry. Who might be yea-sayers?
3 Q. If the test version under your view of maybe
4 people here guess more or yea-say more, some of those
5 87 percent might be yea-sayers. Right?
6 A. Oh, that's what you're trying to find out is
7 eventually -- not on this particular question. But
8 later on you are trying to find out how many people are
9 guessing SPLEND. And that's the point of the whole
10 study.
11 Q. If you subtract 55 from 87, I don't think we
12 are going to have a lot of debate that that's 32
13 percent. Right?
14 A. I have to say it's not. I've never seen
15 anybody do that before. I mean, I've seen people do
16 the subtraction, but I've never seen anybody do it on
17 this type of question.
18 Q. You have seen people subtract out the
19 yea-saying from the people who saw the test. Indeed,
20 that's what you did in Ameritech. Right?
21 A. Yes. But what you do is you do it on a key
22 question. This type of analysis is just never done.
23 It's just arithmetic, but it doesn't mean anything.
24 Q. In the versions you have, those 44 percent of
25 people who don't say yes, they are excluded from the

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1 Q. Let me come back to your questionnaires that
2 are miscoded. Your data shows 87 percent recognized
3 the SPLEND test, this box; right?
4 A. Yes.
5 Q. And it shows 55 percent yea-sayed to this box,
6 the control; right?
7 A. They said they had seen or purchased it.
8 Q. They said yes, and it was not right.
9 A. Right.
10 Q. And under your analysis in the Ameritech case,
11 that's yea-saying, needs to be subtracted out; right?
12 A. No way.
13 Q. You didn't say in the Ameritech to subtract
14 out the yea-sayers.
15 A. I did, but not on this type of question. It's
16 later on it's subtracted. Just the way I did it.
17 Q. Well, let's look at this question. If you
18 code them the way you say to code them -- I'm sorry.
19 You don't even make that decision, because it's done by
20 someone else.
21 If you take out yea-sayers who say, yes, they
22 have seen a product no matter what it is, even if it
23 doesn't exist, that's 55 percent. You obviously don't
24 agree with me, but indulge me, the math who say if you
25 have 87 percent with your test, some of those people

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1 survey all together. The control people who say they
2 have never seen this made up product before, they are
3 not asked any other questions. Right?
4 A. Right. And the same thing when we test on the
5 same procedure.
6 Q. So you get don't get a lot of data about what
7 people think about this box if they say no, because
8 they are out of the survey. You don't ever ask them
9 what they think about this box.
10 A. Yes, well, that makes sense.
11 Q. So the yea-sayers are the only people you are
12 getting any data from on your control cell.
13 A. Right. That's the point.
14 Q. The point is to ask the yea-sayers who say yes
15 to things they are not sure about, what they think
16 later on. Fair?
17 A. Yes. That's what you do when you have a
18 control cell you want to see when you give people the
19 stimulus that they wouldn't have encountered before,
20 you want to know how many people are going to guess
21 SPLEND. And that's what you do. That's the point of
22 this control cell.
23 Q. Well, all things being equal, they might guess
24 on market share. They might guess a-third, a-third,
25 a-third, in Puerto Rico for SAME in a blue box, SPLEND

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1 in a yellow box, and EQUAL. Those are the three market
 2 leaders here. You know that; right?
 3 A. Right.
 4 Q. So if the control was equally different from
 5 all three of those boxes, you would get what you
 6 expect, guessing at a market share value. Right?
 7 A. That makes sense as a theory.
 8 Q. And if the control is closer to one of the
 9 market participants than another, you're probably going
 10 to steer people over to that when they guess at to what
 11 the control is. Right?
 12 A. I think some of that happens.
 13 (Publishing.)
 14 Q. And in your survey, in your own report, you
 15 say in the control cell EQUAL was mentioned by 24
 16 percent of the 100 respondents exposed to the white
 17 control package.
 18 And then you speculate EQUAL was likely
 19 mentioned because it's more similar to the control than
 20 any of the other leading no-calorie sweetener brands on
 21 the market in Puerto Rico. Right?
 22 A. Right. I mean, it wasn't by design. It just
 23 happened that that package we had available just didn't
 24 look similar to us. But it obviously to some
 25 consumers, it did.

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1 pushed to EQUAL as a result of this control than if we
 2 had, as I said, used green as a color.
 3 Q. You could have made up one that was even
 4 further afield from everything else in the marketplace.
 5 A. We could have, yes. We could have. And
 6 probably would have been better to make it green.
 7 Q. Or accept the article you quoted before that
 8 we looked at said 'the expert should select a stimulus
 9 for the control that shares as many characteristics
 10 with the experimental stimulus, the test, as possible.'
 11 Except for the characteristics whose influence
 12 is being assessed, that is what's at issue in this
 13 case. Right?
 14 A. Right.
 15 Q. So there is a 55 percent yea-sayers, if you do
 16 it with the surveys your company did. That included
 17 these 37 who were on white paper, which to you meant
 18 control. But when the person filled it out, they
 19 filled it out as if the person had seen the yellow box,
 20 the test. Okay?
 21 A. I don't know what happened with that.
 22 Q. You suggested we do that math. Let's do it
 23 without those figures. If you don't count the 37 that
 24 are miscoded. And by "miscoded" I mean the person who
 25 did it filled out 'I showed them the yellow box.' But

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1 Q. 24 percent of the people.
 2 A. Right.
 3 Q. And that 24 percent, that's 24 out of 100.
 4 That's not 24 out of the 55 people who were guessing;
 5 45 of them you didn't ever ask the question what they
 6 thought it looked like.
 7 A. Correct. That's the standard way of analyzing
 8 it.
 9 Q. So it's basically half of the people you asked
 10 ever 'What do you associate with this box,' said EQUAL;
 11 because, as you said, it has blue packets on it, and
 12 there is strawberries on it. That's your guess as to
 13 why they said that.
 14 A. Yes.
 15 Q. So you're not really gaging with that control
 16 what people would guess based purely on market share,
 17 because they are making some assessment of the
 18 control's design.
 19 A. They are always going to do that. There is no
 20 perfect control. Almost any box that could have been
 21 produced, there would have been more of some mentions
 22 than another.
 23 This was a valiant attempt to come up with a
 24 control. I think it was reasonable.
 25 But clearly there were more people that were

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1 then someone came along and said, 'Well, it's on white
 2 paper. We should put that in with the white
 3 questionnaires.'
 4 If you just toss them aside and don't count
 5 them at all, your data on the left stays the same,
 6 because that yellow box shown, those were the 200 you
 7 had before in this column.
 8 The white box of the first 63, the 63 done
 9 properly on white paper, and the person circled 2,
 10 which meant it was the control box, the numbers for
 11 that were quite higher, were they not?
 12 A. It appears so.
 13 Q. For the ones that were properly coded, 71
 14 percent of people shown your control were yea-sayers.
 15 The first 63 people that the survey matches were
 16 supposed to have happened, 71 percent were yea-sayers.
 17 Right?
 18 A. Yes.
 19 Q. And then if you look at those people as
 20 yea-sayer, like you have previously said, that's noise,
 21 should be subtracted out; again, I'm sure you will
 22 disagree. But the math on that is pretty clear: 87
 23 minus 71, 16 percent would be the amount in your view
 24 that is not noise. Right? That would be the subtraction.
 25 We can probably agree on that.

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1 A. I already stated my view on doing the
2 subtraction, that's it's totally irrelevant. But I can
3 agree with your arithmetic -- I mean, I can't disagree
4 with your arithmetic.

5 Q. The 37 miscoded questionnaires all say --
6 there is no Question 2, which is the control on yellow
7 paper. That didn't ever happen. But 37 times somebody
8 filled it out. 'I'm going to ask the questions,
9 showing box one. The version we get is on white
10 paper.'

11 So then at some point they got put in with the
12 whites instead of the yellows.

13 If these people properly filled out that
14 circle, if these people had actually been shown the
15 test box, which is what, according to the questioner is
16 what happened here, because they circle 1. If they
17 were accurate, it's the test box. Right?

18 A. Yeah, but, you know, at this point I don't
19 think we can make those assumptions. Because we don't
20 really know. We would have to investigate those 37 in
21 some more detail. So we can just point up.

22 You can juggle numbers around and just
23 speculate. But I don't think that's helpful to the
24 Court. It's just pure speculation.

25 Q. Well, these 37 being included in your 100 for

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1 thing to do.

2 Q. And when you put them in your expert report,
3 and you just testified that they were counted in the
4 white group, you have no idea.

5 A. I agree with you. I mean, at this point, I
6 wouldn't include them at this point, at this will very
7 moment.

8 But if I find out more, we'll decide what to
9 do with them. But at this moment I don't know what to
10 do with them.

11 As we sit here at this moment, I would exclude
12 them.

13 Q. And if you found out that it was the paper
14 that ran out, so it should have been on yellow but they
15 used white questionnaires, you would go by what the
16 person circled, because that's the best evidence of
17 what happened here. Right?

18 A. I wouldn't do anything at this point, because
19 I just don't know. Those are in question. And to
20 speculate about pitting them in one cell or another,
21 it's just not appropriate.

22 Q. The Advance Research people, when they had
23 these filled out, these 37 are coded as seeing the
24 test. If that's correct, there are 237 in your test
25 and only 63 in your control --

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1 the control, pure speculation, as fair as you're
2 concerned.

3 A. I don't disagree with you the fact that there
4 are 37. We need to investigate those to see if there
5 are any issues with those, where they should be, or
6 should they be eliminated. Maybe they should be
7 dropped.

8 But I certainly wouldn't put them on the
9 yellow box side. I mean, that's pure speculation. Why
10 do that?

11 Q. Let me ask you this: When you tabulated it,
12 you put them in on the white side because it was on
13 white paper. Right? That's what is done in your
14 survey.

15 A. I didn't tabulate it.

16 Q. You don't know.

17 A. I just know what Advanced Research gave me. I
18 relied on them to do a good job. Obviously, I had a
19 question about those 37. You know, hey, we need to
20 talk to them about those 37 and try to understand.
21 Should we eliminate them, or was it just was it a
22 paper issue?

23 But, certainly, I wouldn't re-juggle the
24 figures on some hypothetical. You're sticking the 37
25 on the yellow when you have no idea if that's the right

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1 A. Well --

2 Q. Let me finish. Then the number of people who
3 said, yes, they've seen the test box, goes down. And,
4 obviously, you think this is so -- for lack of a better
5 word -- messed up, we should just put these off on the
6 side.

7 A. Well, I'm saying for the moment. I mean, they
8 were asked to do 200 and 100. So my assumption is that
9 they did 200 and 100, and these questionnaires here
10 that are in question, because they were white paper, I
11 assume that people were shown the white box. But do I
12 know for sure? No, absolutely I don't.

13 But I think it's highly unlikely that they
14 were in the yellow box situation. But I don't know. I
15 just don't know. And so why speculate about it? This
16 is not helping the Court at all.

17 Q. But you have already offered your testimony to
18 the Court that it included them in one of the data
19 packages that you're relying on. Right? That's not
20 helping the Court much, either, is it?

21 A. Hey, I say for the moment, let's remove them.
22 I mean, at this very moment that's the best way to go.

23 Q. If you told the survey company 'I need 200 of
24 the yellows and 100 of the whites,' let's be honest,
25 when you got them back in the mail or however you got

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1 them, 200 were in yellow and 100, except for the one we
2 are missing are in white. So it seems like they got
3 the message: 200 yellow and 100 white. Right?

4 A. At this point I couldn't say.

5 Q. And they've got 37 that show an actual
6 interviewer circle 1, which means it was a test, a
7 yellow box, yet it's on the white paper. And then when
8 you match it up to the numbers you've got, those people
9 are being counted in Version 2.

10 Doesn't that indicate to you that it's
11 possible the people that did your study said, 'We've
12 got 237 yellows. People circled Version 1. And we've
13 got 67 people who circled Version 2. It's not going to
14 be very popular when we send this over to Dr. Mazis.
15 So we'll take these 37 and include them in the white
16 box column.'

17 You don't think that's possible at all? We
18 talked before about fraud. You don't think that's
19 possible.

20 A. We could all play Perry Mason here and stand
21 up and say what might have happened. But at this point
22 I think that's just absolute speculation.

23 Q. Let me show you something else that you
24 mentioned, this Perry Mason idea.

25 There was a survey that was missing a

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1 MR. LOCASCIO: Can you come over and look at
2 the screen for one second?

3 THE COURT: We need your services.

4 MR. LOCASCIO: Everyone in the room except the
5 witness and I understand this.

6 THE INTERPRETER: "It is the one that I buy, a
7 small yellow box like that one."

8 MR. LOCASCIO: "Comprar." My teacher would be
9 angry that I had forgotten that that's a verb.

10 BY MR. LOCASCIO:

11 Q. That's what 258 was when it was handed to us.
12 And we said, "I have seen that before."

13 I don't think we need the translator to tell
14 us that's the same answer. That's exactly the same
15 answer. If we really wanted to we could zoom out and
16 see that there is no question. It's not even just the
17 same answer, it's the same writing.

18 And we looked at this one, and it's No. 259.
19 So where we got the data there were some
20 irregularities, some missing. We didn't have 258. And
21 we said, "A lot of copying. Maybe just give us 258."

22 And what we got, you would agree, seems to be
23 someone took 259 and rather inartfully tried to make
24 the 9 into an 8. Right?

25 A. Yes.

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1 questionnaire. And in light of some of the other
2 irregularities, we looked through -- fortunately, you
3 know, we've done 300. So we got them Wednesday night,
4 or less than desirable, Wednesday evening later.

5 We knew what they all said. And we said,
6 "There is no 258. No. 258, we don't have it."

7 "Can we have it?" We asked your lawyers. We
8 said, "We need No. 258."

9 So last night -- or yesterday during court --
10 I apologize -- we get this. This is No. 258.

11 Well, okay. Maybe the person scribbled when
12 they wrote it. So we then go back and figure out how
13 does this play in with the other ones. And we thought
14 something was a little unusual. We saw this as their
15 answer.

16 (Publishing.)

17 This person, after showing them the yellow
18 box, says they saw SPLEND. And then their answer, I
19 don't think you're going to be about to read. I'll
20 take a crack at it and everyone in the room will tell
21 me I don't know the Spanish since high school.

22 It's because the little box is yellow and
23 someone -- maybe I should ask a little guidance on
24 this.

25 THE COURT: The interpreter.

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1 Q. This isn't the sort of accurate, reliable
2 survey data that you normally rely on. Is it?

3 A. No, it happens. But this is the only one, and
4 it's not going to change anything that much.

5 But if had 50 of them like that, I would be
6 really concerned.

7 Q. What might have happened is that 258 was lost
8 or 258 wasn't copied for us, which is what we assumed.
9 But you would expect someone to say that it was lost.
10 You wouldn't expect someone to give you 258, 9 made
11 into an 8.

12 THE COURT: Mr. Zalesin?

13 MR. ZALESIN: Your Honor, may I look at those,
14 because the 258 and 259 we have don't look anything
15 like what they are showing the witness.

16 MR. LOCASCIO: Then when we received 258 from
17 your local counsel yesterday, I think we have other
18 issues to deal with.

19 MR. ZALESIN: What you have is different from
20 what we have.

21 THE COURT: We'll take this up on redirect.

22 MR. LOCASCIO: Your Honor, to the extent
23 McNeil suggest -- can we have your 258?

24 MR. ZALESIN: Sure.

25 If I may, Your Honor. These had to be copied

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1 and all of the respondent identifying information must
2 be removed, redacted. That's a standard survey
3 research requirement. So there was a fire drill on
4 Wednesday to photocopy these 300 questionnaires, remove
5 all the identifying information, which in our case was
6 right on the questionnaire, put them back together and
7 get them over to the other side.

8 These are the originals with the identifying
9 information -- we can't put that into evidence.

10 It appears that at point they got misstapled
11 and a copy of the response to 259 was stapled onto 258.

12 Maybe we can take a brief recess and I can you
13 show it to Mr. Locascio so we don't waste a lot more
14 time.

15 MR. LOCASCIO: Your Honor, I would suggest
16 what the witness said. We might want to do this with
17 you here, because I have an honest concern. We were
18 handed not only the different cover sheet; we were
19 handed one that the 259 now was changed to 258. And I
20 think that's a different issue than what the underlying
21 pages say to the actual 258.

22 MR. ZALESIN: Well, you could have asked. But
23 anyway, I suggest a brief recess.

24 THE COURT: Okay. Very well.

25 MR. ZALESIN: Do you want to over this?

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1 A. I have and I -- I haven't physically looked at
2 them, but I have considered the issue.

3 Q. I asked if you looked at the surveys, and you
4 said you didn't physically look at the surveys. Did
5 you actually view the questionnaires that have the test
6 case circled but are on white paper? Did you see them?

7 A. I did see some of them. I'd didn't look
8 through each and every one of them. But I understood
9 what the issue is.

10 Q. Did you talk to the people at the Research
11 Center about the issue?

12 A. Yes.

13 Q. What did they say?

14 A. I made two phone calls; one, I talked to Mr.
15 Lopez from Advanced Research Center, and he the
16 actually went back and checked with the person who did
17 the data entry. And he said the decision rule in all
18 cases, if it was a white questionnaire they considered
19 that as a Version 2, and if it was yellow they would
20 consider it Version 1.

21 Then I went and I talked to Auri Beltran from
22 Conscious Research so I could understand what happened
23 here, because obviously what was happening was some of
24 the interviews, these 37 interviews, the interviewer
25 had circled the wrong number. In other words, if it

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1 MR. LOCASCIO: I do.

2 THE COURT: We are going to recess, but we are
3 going to recess for lunch anyhow, because it's almost
4 1, and I have to think about something personal. So
5 we'll be back at 2:15. Is that okay?

6 MR. ZALESIN: Thank you, Your Honor.

7 (Lunch break.)

8 (Bench conference off the record.)

9 THE COURT: We shall resume with your
10 cross-examination.

11 I remind the witness he is under oath.

12 CROSS EXAMINATION

13 BY MR. LOCASCIO:

14 Q. Good afternoon, Dr. Mazis.

15 A. Good afternoon.

16 Q. Before lunch I asked you about these 37
17 mismarked surveys. Remember that?

18 A. Yes.

19 Q. And whether they were on the wrong paper or
20 mismarked or mistabulated, at some point you said the
21 safest bet is to not consider them because they weren't
22 reliable because you didn't know what happened with
23 those surveys. Do you remember that?

24 A. That's what I said at that time.

25 Q. Have you looked at those over lunch?

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1 was on white paper and the interviewer should have used
2 the white box and the interviewer was circling No. 1,
3 which signified yellow, that's the circumstance we are
4 talking about.

5 So what I did was I talked to her and I said
6 "What was happening here?"

7 And she said two things: One, that the white
8 paper and the white box always went together. So
9 anybody who had white questionnaires always got the
10 white box.

11 And then I said, "Well, what about these ones
12 that were the 37 where the interviewer circled the
13 wrong number?"

14 And what she said was that what may have
15 happened in some cases is that the questionnaire always
16 said Version 1. And there was supposed to be a Version
17 1 and a 2, if you remember, and because they should
18 have just taken out, the Version 1, and just eliminated
19 it, because it was irrelevant. But what appears to
20 have happened is -- and most of those cases were the
21 single interviewer. One interviewer seems to have
22 always done this. And the person saw Version 1. I
23 think it was 35 out of 37. At least that's my
24 understanding. But any way, that Version 1 was on the
25 questionnaire. So some people inadvertently circled

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1 Version 1, when in fact they should have circled
 2 Version 2.
 3 But they were call given, if it was a white
 4 paper, they got a white box. That's the way it was
 5 data entered. That's the way it was entered at
 6 Advanced Research. And, therefore, I stand by my
 7 original tabulations. They are correct based on what I
 8 have confirmed today.
 9 Q. Based on what you were just told at lunch.
 10 A. Exactly.
 11 Q. And they told you 35 of the 37 were one of the
 12 interviewer?
 13 A. Actually, they didn't tell me that. One of
 14 the attorneys had gone through them, and that's what
 15 she told me.
 16 Q. Did she tell you or he tell you who the person
 17 was made the mistake?
 18 A. I think it was -- I'm going to say Lopez, but
 19 I'm not certain. I can't remember the name.
 20 Q. Rosa Torres?
 21 A. Rosa Torres. That was it.
 22 Q. Did they also tell you that Monica Troche has
 23 at least a dozen, that that person allegedly circled
 24 the wrong box?
 25 A. It certainly could have been more than one.

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1 people circled the wrong box, you would agree that was
 2 probably a mistake in the overall presentation of that
 3 the survey. Fair?
 4 A. Yeah. As I said, originally I had a Version 1
 5 and 2, and they only decided to use one of the
 6 versions. But they should have deleted Version 1 so
 7 they wouldn't create that confusion.
 8 So it was a simple administrative oversight.
 9 Q. You mentioned the surveying was done over the
 10 weekend. I apologize. It seems like it must have been
 11 11 o'clock. It was the 20th and the 21st or the 19th
 12 and 20th?
 13 A. I believe -- at least in this report here by
 14 Advanced Research, it says the 20th and 21st.
 15 Q. These are the people whose recollection of
 16 these events you are relying on for your data; right?
 17 You're relying on what they said there?
 18 A. Yeah, for sure, whether it might have started
 19 -- I mean, I had thought that it started on the 19th.
 20 I thought it was the 19th, 20th, and 21st. But it says
 21 here 20th and 21st. But it was in that approximate
 22 period.
 23 Q. Have you ever experienced a situation where
 24 you've got a questioner or more than one questioner and
 25 time is running out and they just start circling things

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1 But what I verified is -- you can understand
 2 the confusion when it said Version 1 on the
 3 questionnaire. People were circling Version 1 when in
 4 fact they shouldn't have circled Version 1.
 5 But the white box went with the white
 6 questionnaire. That's what I've been told, and that
 7 makes all the sense in the world to me.
 8 Q. So you are testifying that the people who
 9 actually know the answer -- maybe the questioner or the
 10 person above them -- they told you this, and that's
 11 what you're now basing your expert testimony on.
 12 A. Exactly.
 13 Q. Did they tell you whether it was all in one of
 14 the locations or if it happened in multiple locations?
 15 A. I didn't ask. But my understanding from
 16 talking with the attorneys is that it was in more than
 17 one location.
 18 Q. Ponce?
 19 A. That, I don't know.
 20 Q. Arecibo?
 21 A. I don't know.
 22 Q. And Mayaguez?
 23 A. I don't know what the locations were.
 24 Q. Well, let me ask you this: If you put Version
 25 1 on top and now you're suggesting that that's why

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1 because they need to get them in for either a quota or
 2 for some arrangement or deadline you might have or us?
 3 Have you ever seen that?
 4 A. Not that I'm aware of. I mean, if there is
 5 fraud -- I have had two instances where I detected
 6 fraud, but you I don't know why they did it.
 7 Q. Would it surprise you that some of the
 8 questionnaires that are marked wrong are being filled
 9 out and the questionnaires say they were done on the
 10 23rd of February?
 11 A. I can't account for that. Maybe the person
 12 put the wrong date. I really don't know. I don't
 13 think it could have been the 24th, because I don't
 14 think they could have been tabulated. So maybe the
 15 person had the wrong date. I just don't know.
 16 Q. Well, the briefs in this case and all the
 17 evidence to be disclosed were due on the 24th. Do you
 18 remember that?
 19 A. I don't recall the exact date.
 20 Q. Did you have any conversations about getting
 21 your survey in time for those briefs to be filed?
 22 A. No.
 23 Q. Did you know there was a deadline for when the
 24 results had to be in? Did the lawyers talk to you
 25 about that?

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1 A. Yes. The expert report had to be in -- I
2 think it was on -- I don't remember the date, but I
3 think it was on a Tuesday, the expert report was
4 supposed to be in. That's when we issued the interim
5 report. And then the report was finalized on Wednesday
6 when I was able to finally connect and get it to San
7 Juan.

8 Q. So the briefs and then your report. But it
9 was unsigned because you got stuck in the states, was
10 due on the 24th, which was this past Tuesday. And you
11 got in and signed it, and on the 25th we got that;
12 right?

13 A. Right.

14 Q. Do you remember when you got to San Juan all
15 the questionnaires weren't even there yet. They were
16 still coming in; right?

17 A. That, I don't remember.

18 MR. ZALESIN: Objection. Can we clarify what
19 you mean by they weren't there yet, they were still
20 coming in? They weren't where?

21 MR. LOCASCIO: He doesn't know. I'll ask
22 another question.

23 BY MR. LOCASCIO:

24 Q. Dr. Mazis, when you got to San Juan and went
25 to your lawyer's offices, were the questionnaires

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1 A. Well, I have obviously changed my view on it.

2 Q. Obviously.

3 We have these numbers. Right here, if you
4 look there, we have -- you changed your view from when
5 you testified before after you met with your lawyers at
6 lunch and talked with the people at the Research
7 Center. Now your view is keep them in; right? That's
8 what you're saying

9 A. My opinion is solely based on talking with
10 these two individuals. It has nothing to do with
11 talking to the attorneys.

12 Q. The first 63 that aren't mistaken, that are
13 labeled properly, 45 of 63 or 71 percent --

14 MR. ZALESIN: Objection. We have been through
15 these very numbers before, Your Honor. It's just
16 repetitious.

17 THE COURT: This is something I would like to
18 explore. Okay?

19 BY MR. LOCASCIO:

20 Q. 45 of the 63 that were properly coded, 71
21 percent said yes. Those are the yea-sayers, as we
22 talking about before; 18 or 29 percent said no.

23 Now, the 37 that remain, 27 of those 37
24 people --

25 A. I'm sorry. What?

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1 there?

2 A. I don't know.

3 Q. When did you first see any of the
4 questionnaires that have been sent out for survey?

5 A. I don't recall.

6 Q. After you got here, obviously.

7 A. Yes, obviously.

8 Q. After you signed your expert report?

9 A. I would say probably yes.

10 Q. Was it before we came to court yesterday?

11 A. Yes.

12 Q. There are questionnaires dated the 23rd and
13 even some questionnaires dated the 24th.

14 Based on the information you have, is it your
15 understanding that the surveys were all done, as it
16 says in that data report, over the weekend? Or some
17 were still getting done up until the last minute on the
18 23rd and 24th when the briefs and your report had to be
19 disclosed?

20 A. I don't know. I can't answer that question.

21 Q. I put this up before.

22 (Publishing.)

23 When you said 'maybe we should just discount
24 these 37 because we can't really with any level of
25 scientific certainty rely on those --

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1 Q. I'm telling you something, and then I'll ask
2 you a question.

3 THE COURT: It's not there.

4 MR. LOCASCIO: It's not on the sheet.

5 May I approached the flip chart, Your Honor?

6 THE COURT: Yes.

7 (Mr. Locascio is writing on the flip
8 chart.)

9 BY MR. LOCASCIO:

10 Q. The first 63 people. So this was the total.
11 These are properly coded. And this is Mazis' survey
12 data. Properly coded we have yes or yea-sayers in the
13 test. This is in the control only.

14 MR. ZALESIN: I think it's 45.

15 THE WITNESS: 45.

16 BY MR. LOCASCIO:

17 Q. We have 45. And can you tell me how many no's
18 we have?

19 A. 18.

20 Q. And the percentages?

21 A. 71 percent and 29 percent.

22 Q. So for the people we know it's coded right,
23 that's our yes-sayer and that's our no.

24 Let's look at the 37, because there is a
25 question as to how they fit into the scheme of things.

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1 SPLENDA we have 37 miscoded. Yes. Yea-say,
 2 I'll put sayers. And we have no. And the numbers
 3 are -- there is one person that says don't know. It's
 4 the one person in your entire study that says don't
 5 know and it's in this box. On Question 1 the only
 6 person that said here is a box we have seen or
 7 purchased, don't know.
 8 Yea-sayers, 26. Let me get this right.
 9 That's no. 26 no's. One don't know.
 10 And now some basic math and we have 10 yes's.
 11 Here we have 18 out of 63, 29 percent no.
 12 These people never take the survey anymore -- right?
 13 They are done.
 14 A. Right.
 15 Q. And you never find out what they think about
 16 the control, so you can't be sure if they would
 17 associate it with SPLENDA or if they would associate it
 18 with EQUAL or what they know. Right? Once you get to
 19 this point you're out of the survey on the control.
 20 A. That's right. They say that they haven't seen
 21 or purchased a no-calorie sweetener like the one we
 22 showed them.
 23 Q. So these no's -- and they are miscoded -- once
 24 they have no marked, we are never going to know what
 25 they thought because you can't tell from the written

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1 business. So it isn't clear to me how that changes it
 2 that much.
 3 Q. That was, we don't know what these people
 4 said, these 73 percent.
 5 A. Right.
 6 Q. Because you never asked them.
 7 A. Right.
 8 Q. And so we don't know if -- it's hard to say if
 9 we know which group these people were supposed to be
 10 in, except they said SPLENDA; you might be able to
 11 glean something from that. Right?
 12 A. They answered no or don't know, so they were
 13 in the group that they were supposed to be.
 14 Q. They weren't guessing. They weren't
 15 yea-saying.
 16 A. Correct.
 17 Q. And by including these people, this 73 percent
 18 of that, those 37 miscoded forms in with the control
 19 group, if that reduced the amount of information you
 20 knew about the people in the control group, because
 21 they were never asked 'what does this look like,' 'what
 22 do you think this is.' Right?
 23 A. They certainly weren't asked, that's true.
 24 MR. LOCASCIO: No further questions.
 25 Let me mark this as an exhibit, Your Honor.

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1 comments.
 2 A. Right.
 3 Q. 26 over 37. And the don't know, is he out of
 4 survey, also?
 5 A. Yes.
 6 Q. So 27 of these people we are never going to be
 7 able to tell.
 8 A. Right.
 9 Q. 27 out of 37, 73 percent.
 10 You've got a statistics degree?
 11 A. Minor in statistics.
 12 Q. If you had 63 people and you surveyed them and
 13 you've got 29 percent no, and then you get the last 37
 14 that come in the door on the miscoded ones, and 27 of
 15 those people are now out of the survey by saying no or
 16 don't know, the chances of those 37 people saying that
 17 at 73 percent after you had 29 percent in the first 63
 18 is roughly 1 in 300,000 is the changes of that
 19 happening. Correct?
 20 A. I don't know.
 21 Q. Can you tell me the formula to do that or do
 22 we need to take a little longer than we've got here?
 23 A. I'd have to look it up. I don't have it
 24 memorized. The key point is, though, there were only
 25 four people I believe who said SPLENDA in the whole

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1 THE COURT: Yes.
 2 MR. LOCASCIO: It's YY.
 3 THE COURT: Redirect.
 4 REDIRECT EXAMINATION
 5 BY MR. ZALESIN:
 6 Q. Let's see if we can understand, Professor
 7 Mazis, this business about the Version 1 and the white
 8 and the yellow.
 9 As you originally prepared the survey was
 10 there supposed to be two different questionnaires, one
 11 of which would actually say Version 1 at the top and
 12 the other which would say Version 2 at the top?
 13 A. Yes.
 14 Q. And the Version 1's were supposed to be on
 15 yellow paper and the Version 2's on white paper.
 16 A. Yes.
 17 Q. Here are the Spanish questionnaires, Plaintiff
 18 Exhibit 61 that's already in evidence. The yellow says
 19 Version 1 on the top. Do you see that?
 20 A. Yes.
 21 Q. And the white says Version 1 on the top.
 22 A. Yes.
 23 Q. And that's not the way it was supposed to be,
 24 but that's what happened.
 25 A. Right.

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1 Q. So instead of having two different ways of
2 distinguishing between the people who saw the yellow
3 and the people who saw the white, you had only one way;
4 right?

5 A. Yes.

6 Q. And the check-off box, which is actually on
7 the screening questionnaire in the upper right-hand
8 corner, you prepared that on the assumption that there
9 would be two different questionnaires, one of which
10 said Version 1 and the other which said Version 2 at
11 the top. Is that right?

12 MR. LOCASCIO: Objection the leading witness.

13 BY MR. ZALESIN:

14 Q. What was your thinking when you prepared that
15 check-off box?

16 A. Yes, that was the way I had it. I'm looking
17 at the screener that I originally prepared, and that
18 was the way I had it. Just wanted to double check on
19 that. Actually, they changed a little, but I had
20 Version 1 as a code 1 and they changed it to 1A. And
21 Version 2, I just had as a 2 and they had as a 2B.

22 Q. Okay. So looking at them side by side, these
23 Versions 1's and Version 2's were prepared by you on
24 the assumption that the questionnaires would say
25 different things on the top.

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1 questionnaire circled Version 1, which is what it says
2 on the top?

3 A. 37 respondents. I don't know how many
4 interviewers, but it 37 respondents.

5 Q. Okay. Now, when the questionnaires came back,
6 how many yellow questionnaires came back?

7 A. 200.

8 Q. How many white questionnaires came back?

9 A. 100.

10 Q. 63 plus 37 equals 100.

11 A. Right. And I have no reason to believe
12 anything but that everything was okay.

13 Q. And if, as you have learned the field service,
14 if a person had a white questionnaire they always had a
15 white box. Is there any other way that you could wind
16 up with 100 white questionnaires?

17 A. No.

18 Q. When Mr. Locascio prepared this Exhibit YY he
19 used the phrase properly coded and miscoded.

20 Do you understand that he is referring only to
21 whether they circled Version 1 or Version 2?

22 A. Yes.

23 Q. Do you understand that there is any error in
24 how the data from the answers to the questions were
25 tabulated in any of those interviews?

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1 MR. LOCASCIO: Objection. Leading

2 MR. ZALESIN: I'm on redirect, Your Honor.
3 I'm just trying to clarify things.

4 MR. LOCASCIO: Same objection, Your Honor.
5 The witness, if he can explain, he should. He
6 shouldn't be testifying for the witness.

7 THE COURT: Can you rephrase?

8 MR. ZALESIN: Sure.

9 BY MR. ZALESIN:

10 Q. Can you explain again what you had in mind
11 when you prepared these check-off boxes that say
12 Version 1 and Version 2 on them?

13 A. That there would be two different versions,
14 that there would be a Version 1 and a Version 2; and
15 the people that would do the yellow questionnaire,
16 Version 1 would be circled there.

17 And this is really for the coding purposes.
18 It really didn't have anything to do with the
19 interviewer. And Version 2, that would be the white
20 version.

21 Q. Okay. And what happened is that -- what does
22 did white version say on the top?

23 A. Version 1.

24 Q. And 37 people, according to Mr. Locascio, who
25 37 of the interviewers who filled out the white

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1 A. To my knowledge there was no error in the way
2 it was tabulated.

3 Q. Has any error been brought to your attention?

4 A. No.

5 Q. By the way, can you vouch for these numbers,
6 the ones that Mr. Locascio wrote on Exhibit YY, the 10,
7 26, and 1 for the 37?

8 A. I hadn't done those calculations.

9 Q. Okay. So you're just accepting his
10 representation.

11 A. Yes.

12 Q. Mr. Locascio asked you some questions about
13 the Granutech survey report that was sent to you. Do
14 you remember that?

15 A. Yes.

16 Q. There was some question about the brief that
17 Merisant had filed and I suggested that it be showed to
18 you but it wasn't. Do you remember that?

19 A. Yes.

20 MR. LOCASCIO: Objection, as the witness had
21 never seen it before, foundation. He said he had never
22 seen it. He's going now to put it into evidence. I'm
23 not sure why he would do that.

24 MR. ZALESIN: Okay.

25 (Publishing.)

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1 BY MR. ZALESIN:
 2 Q. Do you remember being provided with that?
 3 THE COURT: Overruled.
 4 MR. ZALESIN: I represent that this is
 5 Merisant's brief, Your Honor. McNeil well knows that
 6 the traditional way to prove secondary meaning is to
 7 provide and Every Ready design survey, as McNeil has
 8 done in prior litigation. See McNeil versus Granutech.
 9 BY MR. ZALESIN:
 10 Q. Do you remember see?
 11 A. Yes.
 12 MR. ZALESIN: May I have Plaintiff Exhibit 45?
 13 (Documents handed to the witness and to
 14 the court.)
 15 MR. LOCASCIO: Your Honor, object to this
 16 being put into evidence. It's a survey from another
 17 case that Patterson Belknap and McNeil has done, that
 18 whether the witness has seen it or not, to the extent
 19 that this survey is going come in and, I guess, be some
 20 claim that this is a proper to do a survey, neither
 21 does the McNeil/Granutech case analyze the survey and
 22 say this is the right way questions nor has Merisant
 23 taken that position.
 24 And we oppose it being put into evidence. It
 25 has nothing to do with this case.

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1 reviewed and let him comment on what use if any he made
 2 of the report.
 3 MR. LOCASCIO: Two points in response, Your
 4 Honor. First of all, an expert can review whatever he
 5 wants; it doesn't mean it now admissible in court.
 6 It's still hearsay and other things will come into
 7 play. He can review it and he can say he relied on it.
 8 It doesn't mean it's admissible.
 9 The point clearly in the brief language is
 10 McNeil should do a survey, and they know they need to
 11 do a survey. They have done it before. The language
 12 certainly does not say the Granutech survey, which if
 13 you read the case, Mr. Zalesin hasn't let us have the
 14 pleasure of seeing the survey until Tuesday. The case
 15 doesn't talk about the questions asked in the survey,
 16 nor does it say it's the right way to ask those
 17 questions. And we certainly aren't saying that in this
 18 brief. We are saying they filed cases before; you
 19 serve his. They should come to Your Honor with a
 20 survey.
 21 THE COURT: Let's go ahead. You'll have an
 22 opportunity to ask him in redirect.
 23 BY MR. ZALESIN:
 24 Q. Again, did you receive this report?
 25 A. Yes.

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1 MR. ZALESIN: Mr. Locascio examined Professor
 2 Mazis whatever it is he reviewed. I want the Court to
 3 see what it is he reviewed. And I would disagree with
 4 Mr. Locascio's characterization of what they have said
 5 in the brief. But that's neither here nor there. I
 6 just want to put in evidence what it is the witness
 7 reviewed since it was gone into on his
 8 cross-examination.
 9 THE COURT: This has to do with that prior
 10 case?
 11 MR. ZALESIN: This is the --
 12 MR. LOCASCIO: It's not from Bristol
 13 Meyers/McNeil, Your Honor.
 14 MR. ZALESIN: This is the survey that was done
 15 in the case that Merisant cited, and it's to briefed
 16 Your Honor when the day before the initial conference
 17 on February 10th they told the Court that McNeil has
 18 failed to do a survey like the one they did in the
 19 Granutech case.
 20 What happened next, as Professor Mazis has
 21 testified, is a couple of days later Professor was
 22 retained and I think probably the only thing he was
 23 sent, other than some of the legal papers, was this
 24 Granutech survey report. He reviewed it. It just want
 25 to put the report into evidence as part of what he

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1 Q. What use if any did you make of it in
 2 preparing the questionnaire in this case?
 3 A. I looked at it and it was similar to other
 4 secondary meaning surveys that I have been involved
 5 with. And it was one piece of information that I used
 6 in formulating my survey.
 7 Q. Did you copy the questions verbatim out of the
 8 Granutech survey?
 9 A. No.
 10 Q. Mr. Locascio asked you some questions about
 11 how to go about choosing a control for a trademark
 12 survey such as this. Do you recall that?
 13 A. Yes.
 14 Q. I think he asked you and you agreed whether
 15 the fact that the trade dress of the control product is
 16 not infringing should be one of the elements that goes
 17 into the selection of a control stimulus. Do you
 18 remember that?
 19 A. Yes.
 20 Q. Is that the only element that should go into
 21 that decision?
 22 A. No.
 23 Q. What other thing should you think about?
 24 A. Well, one other thing is the idea here is that
 25 you don't want the stimuli to be overlapping, is that,

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1 if you have a yellow SAME box and you use a yellow
2 SUGAR TWIN box as the supposed control, then it's not
3 controlling what you want to control, which is
4 guessing, because people also could be confused by the
5 SUGAR TWIN box.

6 So it's basically -- in research we call that
7 a confound. You confounding the issue of guessing with
8 the issue of potential confusion resulting from the
9 SUGAR TWIN box. So it's just not an appropriate
10 control, at least not a control for noise.

11 Q. Mr. Locascio asked you some questions about
12 whether you have had the experience in prior surveys
13 you have been involved with where interviewers have
14 simply faked or created fraudulent interview. Do you
15 remember that?

16 A. Yes.

17 Q. And you said it's happened to you twice in
18 your career.

19 A. Twice.

20 Q. Have you seen any evidence in this case that
21 any of the interviews that were conducted for this
22 survey were faked?

23 A. No.

24 Q. Are you concerned about the integrity of the
25 data in this case?

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1 it it's almost the ultimate control, because it's a
2 product that doesn't exist on the market. And to the
3 extent that people say that Ultra Tone is always
4 lower -- I think it was a price claim, I think. That
5 is my recollection.

6 To the extent that people agree with that,
7 then it's clear that there are obviously guessing.

8 Q. Okay.

9 A. But the key point is if the subtraction that
10 occurs is always on is the key question that you're
11 interested in. Here, this is on the key question; it's
12 not on questions that occur earlier in the
13 questionnaire, as was suggested in some of Mr.
14 Locascio's questions.

15 Q. That's what I want to get to.

16 So you subtracted when you were doing a
17 control survey, and you were testifying for the
18 defendant with respect to this advertising claim?

19 A. Yes.

20 Q. So you subtracted 17.4 percent because that's
21 the amount of people who said always lower?

22 A. Yes.

23 Q. In this case what percentage of people exposed
24 to the control stimulus said SPLENDIA?

25 A. Before control, 62.5 percent.

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1 A. No.

2 Q. Mr. Locascio asked you some questions about
3 the testimony you gave in the Ameritech case. Do you
4 remember that?

5 A. Yes.

6 Q. That was a case about telephone equipment; is
7 that right?

8 A. Yes, I think it was Ameritech and M.C.I.

9 Q. So the portion that Mr. Locascio highlighted,
10 respondents are being asked whether they agree that a
11 certain attribute, the so-called always lower claim.
12 Was that what that case was about, the
13 always lower claim?

14 A. Yes, that was the key claim in the case.

15 Q. So they are being asked whether the always
16 lower claim is an advertising case?

17 A. Yes.

18 Q. Whether the always lower claim applies to
19 Ameritech Ultra Tone, and that's the control you made
20 up?

21 A. Yes.

22 Q. And when you did the control research, what
23 happened? That is 17.4 percent.

24 A. That's for the control cell. That's to assess
25 the amount of guessing. I mean, when you come down to

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1 Q. Before control. But how many people when they
2 saw the control?

3 A. In the control, 4 percent.

4 Q. Did you subtract that 4 percent from the
5 people who said SPLENDIA in the test group?

6 A. Yes.

7 Q. Is that same thing you did in the Ameritech
8 case?

9 A. Yes.

10 Q. Is that the right way to do a control?

11 A. That's the way I always do it.

12 Q. Would it be right to subtract anybody who said
13 that they recognize this box regardless of what
14 response they gave after that?

15 A. That's not the proper way.

16 Q. Mr. Locascio asked you some questions about
17 the color of the paper that was used for the two
18 interviews. Do you remember that?

19 A. Yes.

20 Q. And he suggested that wasn't proper to use
21 yellow paper for the test cell and white paper for the
22 control cell. Do you remember that?

23 A. Yes.

24 Q. First of all, is it common in survey research
25 to use different colored paper for different groups of

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1 people who are shown different stimuli?

2 A. Yes.

3 Q. Why do you do that?

4 A. Well, it's really to avoid error. If you have
5 a particular stimulus and you can tie it to a
6 particular paper color, then there are going to be
7 fewer errors.

8 For example, if you used in this case blue and
9 pink paper, then certainly there would probably be more
10 error, because the people who were supposed to get
11 the yellow box have the pink paper, for example. So
12 it's kind of confusing to them.

13 Q. Is yellow paper something out of the ordinary
14 in your experience?

15 A. No.

16 Q. Have you seen pads of paper, yellow legal pads
17 throughout your lifetime?

18 A. Yes.

19 Q. Do you have any reason to think that the use
20 of yellow paper by the interviews bias the responses in
21 this survey?

22 A. No, I don't.

23 Q. Finally, I just want to go back to the issue
24 of appropriate selection of a control.

25 Mr. Locascio began his cross-examination by

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1 A. Well, just look at dimensions. 110 people
2 volunteered color as the reason why they chose to
3 associate SPLENDIA with the yellow box. And that was
4 far higher than any other number.

5 The next one was pictures, 32, and the design
6 had 22, and color of letters, 17, and so on. So color
7 was by far the dominant cue here.

8 Q. So Mr. Locascio asked you, for example, the
9 SPLENDIA trade dress has a cup of coffee in the lower
10 right-hand corner, whereas SUGAR TWIN trade dress has a
11 cup of coffee in the center on the bottom. Do you
12 remember that?

13 A. Yes.

14 Q. Is that an important distinguishing factor in
15 your opinion?

16 A. I don't think so. I think when consumers look
17 at these boxes they don't remember whether the coffee
18 cup is in the center or on the right.

19 Q. And he also asked you about whether there is
20 fruit in the iced tea glass, which is on the left side
21 of the SPLENDIA package, but there is no fruit in the
22 ice tea glass on the left side of the SUGAR TWIN
23 package. Do you remember that?

24 A. Right.

25 Q. Again, from your survey, is that the way

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1 showing you a list of all the different elements of the
2 SPLENDIA trade dress and comparing them to the SUGAR
3 TWIN package. Do you recall that?

4 A. Yes.

5 Q. And I think he got you to agree that many of
6 them are not on the SUGAR TWIN package. Right?

7 A. Yes.

8 Q. But some of them are. Is that right?

9 A. Yes.

10 Q. And which one if any is important in your
11 opinion?

12 A. Well, clearly the color is by far the most
13 important.

14 Q. Why do you say that?

15 A. Well, when you look at the open ended
16 responses when the people are asked why they selected
17 SPLENDIA as an example in my survey, the overwhelming
18 number of responses was the color.

19 Q. Let's just review that. That's page 14 in the
20 data table, which is Plaintiff Exhibit 56. Do you
21 still have that?

22 A. Yes.

23 Q. Can you go through this and explain why you're
24 saying that the color yellow is very important in this
25 instance?

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1 people identify the SPLENDIA box?

2 A. No, they clearly form an overall impression.
3 But the key element in forming that overall impression
4 is the color of the box. I'm not saying the other
5 elements don't play a role, but the color of the box is
6 really -- you know, they mentioned the lettering and
7 some other features, but the color of the box is really
8 what most people are saying.

9 Q. And if the color of the box is the key thing
10 that enables most people to tell even when the brand
11 name is removed that this is a box of SPLENDIA, is it
12 appropriate to use a yellow box as the control?

13 A. Not in my opinion.

14 MR. ZALESIN: Nothing further.

15 THE COURT: Recross.

16 RECROSS EXAMINATION

17 BY MR. LOCASCIO:

18 Q. Can you tell there is a different shade of
19 yellow between the SUGAR TWIN and SPLENDIA? Can you
20 make that distinction?

21 A. Yes.

22 Q. You understand that there are different shades
23 of colors; right?

24 A. Yes, I do.

25 Q. Do you think consumers can make those

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1 distinctions here in Puerto Rico?

2 A. I think if you put them side by side, yes.

3 Q. When you set up your study, people, as you
4 just said, the predominant reason anybody associated
5 this test box with SPLENDIA is the color yellow correct?

6 A. Yes.

7 Q. And for your control it's just white, stark
8 white; right?

9 A. Yes.

10 Q. Do you think SPLENDIA has a protectable
11 interest in a yellow box of this shade period?

12 MR. ZALESIN: Objection. It calls for a legal
13 conclusion, Your Honor. That's for the Court to
14 determine.

15 MR. LOCASCIO: This is my reason I'm asking
16 this question, Your Honor. If the plaintiffs are again
17 contending that it's for the Court to determine if
18 there is a protectable interest in every yellow box,
19 then I think we are back at the same impasse of what is
20 the trade dress at issue. And that's why these
21 questions could directly or whether Dr. Mazis's report
22 says anything about the whole trade dress issue.

23 THE COURT: The issue as I see it is whether
24 there is a predominant element. And that should be
25 taken into account by this Court in determining what

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1 A. 3 people.

2 Q. 3 percent?

3 A. 3 percent.

4 Q. So the amount of recognition or secondary
5 meaning of the design between the yellow box and the
6 control using your control, when these people are
7 talking about the design of the box is 8 percent.

8 MR. ZALESIN: Objection to the form of the
9 question.

10 A. No. You're doing arithmetic here.

11 THE COURT: Overruled.

12 A. I mean, if you want to focus on that, you've
13 got to remember the way this coding works. I mean, for
14 example, some people said packaging, paper packet.
15 Well, that's a design element.

16 Pictures on the box, that's a design element.

17 The design, that's obviously design element.

18 Color of the paper packet, that's a design
19 element.

20 Q. Are you ready to start?

21 A. Yes.

22 Q. Sure. We have paper packet. Your test box
23 has a paper packet on it. How many people associate
24 that packet with one company, in this case SPLENDIA? 3
25 people, 1 and-a-half percent.

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1 the trade dress is. Or you have to take into account
2 the combination elements. And perhaps there is a
3 dominant one, but that doesn't detract from the rest.
4 And I think I have to make that determination.

5 We have here the expert testifying with
6 respect to consumers perceptions. I don't think he
7 would be qualified to make that ultimate conclusion.

8 Your objection is sustained.

9 BY MR. LOCASCIO:

10 Q. Dr. Mazis, Your survey shows more about
11 alleged secondary meaning in a yellow box than it does
12 in a box that has this particular design; correct?

13 A. No.

14 Q. Let's look at how many people talked about the
15 overall design of your test box. 11 percent; right?

16 A. That's one design element.

17 Q. Dr. Mazis, I asked you how many people talked
18 about the overall design. We can talk about the
19 elements all you want. But answer my question about
20 the design. How many said it's the design of the box?

21 A. 22.

22 Q. 11 percent.

23 A. Yes.

24 Q. How many people are over there in your
25 control, the white box? It's on the screen also.

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1 A. Right.

2 Q. How many people over here look at this control
3 box and talk about the packet? One person, 1 percent.
4 Not a lot there that's specific to the test package;
5 right?

6 A. Okay. I'm not sure what that means, but go
7 ahead.

8 Q. Pictures on the box. What do you take the
9 pictures on the box to mean from this, your test? What
10 are those?

11 A. Pictures on the box, well, we don't know
12 exactly. People don't often articulate exactly what
13 they mean. It could have been the iced tea, it could
14 have been the coffee cup. We just don't know. That's
15 what people say.

16 Q. Well, people put verbatim descriptions in on
17 the questionnaires, but you have never seen most of
18 those. So you're going on how someone quantified them,
19 they put them in categories. In this case pictures on
20 the box; right?

21 A. Right, but I have seen enough consumers
22 surveys to know often people aren't that specific about
23 the different elements. People just don't usually give
24 that much information. They don't say, 'well, it was
25 the iced tea on the box and it was the fruit in the

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1 iced tee picture.' They just don't do that. They use
2 kind of short cuts, just the way they usually think of
3 things in a more general way.

4 Q. What do you consider when you have a category
5 in your report pictures on the box to be the pictures
6 on the test box?

7 A. Yes, that's the yellow box cell.

8 Q. The pictures on the box in this breakdown are
9 the cup of coffee and the ice tea glass and picture and
10 the packet. Nothing else in the picture on this box,
11 is it?

12 A. No, I agree.

13 Q. So If people said some of those things or all
14 of those, pictures on the box, cup of coffee, you think
15 it would be categorized in that one; right?

16 A. Probably.

17 Q. For your test box, you've got 32 people, 16
18 percent; right?

19 A. Right.

20 Q. Control box, it's like 18 people, 18 percent;
21 right?

22 A. Okay, yes.

23 Q. So there is less percent of people in the
24 control in the test cell associating these pictures on
25 the box in your version of the study than there are

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1 associating it on the test box -- right? -- I mean the
2 control. I mean that's less.

3 A. Yeah, but that's not a fair comparison,
4 because if you're looking at design elements there is
5 all these other design elements.

6 The way I would do it is I would lump all the
7 designs elements together, and you probably have
8 probably maybe 30 percent of the people that are
9 mentioning design elements. I haven't actually
10 calculated, but it's a pretty number of them mentioning
11 design elements.

12 Color is 55. But there is a lot of design
13 elements that get a lot of mention. It's kind of what
14 Your Honor said, it's not just the color, though color
15 may be predominant; there are all these elements that
16 people are mentioning as well. It's not just color.

17 Q. If McNeil doesn't have a right to all yellow
18 boxes and that's not a protectable interest, then that
19 part of your survey really doesn't matter in this case;
20 right? The color only answers.

21 A. You're asking me a legal question. I can't
22 answer a legal question.

23 Q. In your opinion having testified about survey
24 evidence indicating secondary meaning in a box, do you
25 think your survey evidence, these 55 percent of people

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1 are imparting secondary meaning to any yellow box?

2 A. That, I can't answer.

3 Q. You don't know.

4 A. I can only answer that those are the people
5 who responded to this box, the SPLEND box with no
6 identification. That's the only way I can answer it.

7 Q. The way you say we should determine the noise,
8 to subtract out the controls, how many people who saw
9 the control box said SPLEND, not how many yea-sayed or
10 guessed or made up anything. It's only the people who
11 saw this box and said SPLEND. That's the only group
12 you subtract out; correct?

13 A. That's the way this research is done.
14 Everybody I know that does research like this, that's
15 the way they do it. That's accepted standard. You can
16 do all kinds of subtractions you want. Lawyers can
17 jungle around figures. But people who do survey
18 research only do it the way I said, in my opinion.

19 Q. They don't always listen to you. You think
20 they do it the way you do it.

21 A. You know, my opinion. You might get somebody
22 who might disagree. But in general this is the
23 standard way to do this type of research.

24 Q. Do all did other people that do surveys, in
25 your view, put elements on the control box that steer

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1 people away from the product at issue, such as a blue
2 packet or strawberries or red, white, and blue box? Is
3 that also customary as you see the survey world?

4 A. No, not particularly, but it's not easy to
5 come with a control that's perfect. All controls are
6 imperfect in some way.

7 Whatever color you use, it might steer a
8 person one way or the other.

9 Clearly, in this case, there wasn't any
10 intention to do that, because this was the box that was
11 available, this Internet box that we had available and
12 that's what we used. It was the best thing at the
13 time. It is it a perfect control? I don't think it's
14 perfect. But is it satisfactory? Yes, I think it is.

15 Q. You didn't pick what the control was going to
16 look like; right? Johnson & Johnson sent you a
17 control. Is that what you said earlier this morning?

18 A. They sent me the Internet box and they said,
19 "This is what we have available."

20 And I said, "Okay. Let's go with it."

21 Q. You didn't suggest I'd like it to be this
22 color, I'd like it to have these elements on it. You
23 said send me something and I'll either give it thumbs
24 up or thumbs down.

25 A. Right. I looked at it and, as I said, the

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